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IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT

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INTRODUCTION

This case presents a challenge to key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107-155, 166 Stat. 81, which impose new and unprecedented restrictions on core political speech in the guise of revising this nation's campaign finance laws.

Despite its size and complexity, the BCRA was designed to achieve two principal goals. Title I prohibits the use of so-called soft money by political parties, even for traditional party building activities such as voter registration and get-out-the-vote drives. Title II makes it a crime for even nonprofit, nonpartisan, membership organizations like the ACLU to broadcast an ad that mentions the name of a federal candidate in the period preceding an election.

The district court correctly recognized that neither of these broad provisions could be reconciled with our constitutional traditions. It therefore declined to uphold the law that Congress had written. It nevertheless upheld a rewritten version of the law that continues to pose severe constitutional problems. Because the ACLU is not directly affected by the soft money ban, we will leave it to others to explain why the continued prohibition on the use of soft money for issue advocacy is unconstitutional. We do, however, have a very direct stake in the lower court's interpretation of Title II.

If that interpretation is upheld, it will now be a crime for the ACLU to broadcast an ad on radio or television advocating its views on a particular civil liberties dispute if the ad could be construed as attacking, supporting, promoting, or opposing a candidate for federal office. To place that dilemma in more concrete terms, President Bush has just announced his intention to run for a second term. There have also been press reports that the Administration may be seeking enhanced surveillance powers from

Congress as part of a new legislative initiative. If the ACLU chose to oppose these steps on civil liberties grounds in a broadcast ad that referred to the President, we would be risking criminal prosecution based on the lower court's decision in this case.

That result would dramatically transform the rules of political debate in this country and go far beyond anything this Court has ever permitted under the First Amendment. The ACLU urges this Court to reverse the district court and invalidate the challenged Title II provisions.

STATEMENT OF THE CASE

1. This litigation arises from plaintiffs' challenge to various provisions of the BCRA, including the soft money restrictions embodied in Title I and the issue advocacy restrictions embodied in Title II. As part of the *McConnell* complaint filed in the district court, the ACLU specifically alleged that its First Amendment right to speak out on issues of concern to the organization and its members was violated by the broad definition of "electioneering communications" set forth in the BCRA.

Prior to passage of the BCRA, all corporations, unions, associations, committees and individuals were free to engage in political speech without being subject to the Federal Election Campaign Act so long as their speech did not expressly advocate the election or defeat of a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 45 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The BCRA dramatically expanded this regulatory regime by extending the ban on corporate and union expenditures to cover all "electioneering communications," regardless of whether they involve express advocacy. For those individuals and groups not

covered by the broadcast ban, BCRA imposes substantial reporting and disclosure requirements.

Congress provided two definitions of the term "electioneering communications" in § 201. Under the primary definition, an "electioneering communication" means any broadcast, cable, or satellite communication that: (a) refers to a clearly identified candidate for federal office; (b) is made within 60 days of a general election or 30 days of a primary election; and (c) is targeted to the relevant audience (except in the case of the President or Vice-President where there is no targeting requirement). J.S. App. 4a.[1]

Congress also anticipated that the primary definition might not be sustained. It therefore provided a fallback definition that applies only if the primary definition is invalidated. In contrast to the primary definition, the fallback definition is not limited to the period preceding an election. Rather, it prohibits at any time of the year a broadcast, cable, or satellite communication that "promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." In addition, the communication must be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." J.S. App. 5a.

Under § 201, any person or organization that spends more than $10,000 in a calendar year on "electioneering communications" is subject for the first time to detailed reporting and disclosure requirements.

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[1] Citations to "J.S.App." refer to the Appendix to the ACLU's Jurisdictional Statement in this case. Citations to the lower court opinion are denoted as Supp. App. and refer to the supplemental appendix filed by the McConnell plaintiffs in 02-1674 et al.

Under § 203(a), corporations and unions are barred from using their general treasury funds to engage in any "electioneering communications." However, this apparently absolute prohibition is modified by § 203(b), the so-called Snowe-Jeffords Amendment. Pursuant to Snowe-Jeffords, nonprofit corporations that qualify under § 501(c)(4) of the Internal Revenue Code, like the ACLU, are permitted to engage in "electioneering communications" if those communications are funded entirely by individual contributions and if the organization submits the detailed financial disclosure reports required by § 201, including the identity of any donors who contributed a total of $1,000 or more during a reporting period that can extend for nearly two year. J.S. App. 8a.[2]

As the last piece of this statutory puzzle, Congress adopted § 204 of the BCRA, known as the Wellstone Amendment, which revokes the exception that the Snowe-Jeffords Amendment ostensibly provides. J.S. App. 10a.[3] In short, the statute that emerged from Congress prohibits all unions and corporations - including nonprofit and nonpartisan corporations like the ACLU - from using their general funds to pay for any broadcast ad that names a clearly identified candidate within the 30/60 day window preceding federal elections.

Finally, in § 214 of the BCRA, Congress tightened the rules on coordinated expenditures (which are treated as

[2] The Snowe-Jeffords exception also applies to "political organizations" organized under § 527 of the Internal Revenue Code. BCRA § 203(c)(2).

[3] It is not clear why Congress did not simply repeal the Snowe-Jeffords Amendment when it adopted the Wellstone Amendment. The intent of the Wellstone Amendment is nonetheless plain. It states that the exemption authorized by the Snowe-Jeffords Amendment "shall not apply in the case of a targeted communication that is made by an organization described in" the Snowe-Jeffords Amendment. In other words, the Snowe-Jeffords Amendment is rendered a nullity because it no longer applies to the organizations it was meant to cover.

contributions) by repealing the existing FEC regulations and then instructing the FEC to issue new regulations that do not require "agreement or formal collaboration," and that specifically address "payments for communications made . . . after substantial discussion about the communication with a candidate or political party." J.S. App. 11a.[4] Pursuant to § 202 of the BCRA, moreover, this reconception of the coordination rules applies not only to express advocacy but to all speech now embraced by the expanded definition of "electioneering communications."

2. By a 2-1 vote, in a nearly 1700 page decision, the district court struck down the primary definition of "electioneering communications" contained in § 201 of the BCRA as an overbroad restriction on constitutionally protected speech. The district court also struck down a critical portion of the fallback definition as unconstitutionally vague. The district court nonetheless concluded that the remaining portion of the fallback definition could stand on its own, and was neither vague nor overbroad.

As a result, the district court wound up sustaining a definition of "electioneering communications" that is broader in many ways than the definition it struck down as overbroad, that is vaguer in many ways than the definition it struck down as too vague, and that does not resemble the test for "electioneering communications" that Congress adopted as either its primary or its fallback definition.[5]

[4] The FEC published its new regulations on January 3, 2003. *See* 68 Fed. Reg. 421.

[5] The district court also ruled on numerous other provisions of the BCRA, which we do not address here because they are beyond the scope of the questions presented in the ACLU's jurisdictional statement. Those other rulings, however, have been presented to the Court in other jurisdictional statements filed by the numerous parties to this litigation.

Judge Leon's opinion was dispositive on the Title II questions. While recognizing that a prohibition on broadcast ads that refer to a clearly identified candidate within 30 days of a primary election or 60 days of a general election has the benefit of clarity, he concluded that it "sweeps so broadly that it captures too much First Amendment protected speech . . ." Supp. App. 1147sa. Quoting from a declaration submitted by Laura Murphy, director of the ACLU's Washington Office, Judge Leon noted that "[t]he 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives." *Id.* at 1148sa. He further recognized that the electorate is often most attentive in the period preceding an election, Supp. App. 1149sa, and that the mere fact "that issue advertisements mention the name of a candidate . . . does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes." *Id.*

Having found the primary definition of "electioneering communications" to be unconstitutional, Judge Leon then turned his attention to the backup definition. He began his discussion by rejecting the claim that a prohibition on broadcasts ads that "promote," "support, "attack," or "oppose" a candidate for federal office is unconstitutionally vague. According to Judge Leon, a person of ordinary intelligence reading those words would understand what could or could not be said in a broadcast ad without running afoul of the criminal prohibitions of the BCRA. *Id.* at 1162sa – 1164sa.[6]

[6] Judge Leon reached this conclusion despite the fact that undisputed evidence in the record demonstrated that even the most avid advocates of the BCRA often disagreed on whether a particular ad should be

Congress, apparently, had more concerns about the scope and ambiguity of this fallback definition than Judge Leon. It therefore attached a limiting principle to its fallback definition of an "electioneering communication," stipulating that it would only apply to broadcast ads that were "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Paradoxically, Judge Leon was more troubled by this limiting language, which he found to be unconstitutionally vague and likely to produce a chilling effect on constitutionally protected speech. *Id.* at 1165sa – 1166sa. Unable to uphold the fallback definition as written, Judge Leon chose to sever the offending language, *id.*, leaving in place a definition of "electioneering communications" that Congress itself had felt constrained to narrow, and that lacks even the temporal limitations of the primary definition that he had previously declared unconstitutionally overbroad.

Judge Leon's approach to the fallback definition was reluctantly joined by Judge Kollar-Kotelly.[7] But Judge Leon joined with Judge Henderson in ruling that the Wellstone Amendment, § 204 of the BCRA, was unconstitutional as applied to nonprofit organizations that engage in issue advocacy and that meet the criteria set forth in *FEC v.*

characterized as a genuine issue ad or a so-called "sham ad." As Judge Kollar-Kotelly noted in her concurring opinion, "[t]he expert testimony in this case . . . illustrates how one person's genuine issue advertisement can be another's electioneering commercial." Supp. App. 786sa. Judge Leon's notion that the fallback definition does not apply to "neutral" ads, *Id.* at 1163sa, offers scant protection because of the ambiguity of the term and the unconstitutional requirement that advocacy groups refrain from advocating.

[7] Judge Kollar-Kotelly, argued that the primary definition is consistent with the First Amendment and reluctantly endorsed the fallback definition only to ensure that at least some portion of Title II was sustained. Supp. App. 885sa – 886sa. In Judge Henderson's view, both the primary and fallback definitions of "electioneering communications" are unconstitutional in their entirety. *Id.* at 345sa – 371sa.

Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)(MCFL). Supp. App. 1166sa. Corporations that qualify for the "MCFL" exception therefore retain the benefit of the Snowe-Jeffords Amendment under the district court's decision. As a result, they are free to engage in otherwise prohibited 'electioneering communications" if they comply with the strict and burdensome disclosure and reporting requirements of § 201, and if they pay for their "electioneering communications" entirely with individual contributions. *Id.* at 1167sa – 1168 sa. On the other hand, nonprofit corporations that do not qualify for an "MCFL" exception remain subject to the Wellstone Amendment, and thus are barred from engaging in "electioneering communications" unless they create a separate political action committee to speak for them. *Id.* at 1168sa.

Judges Kollar-Kotelly and Leon wrote a separate *per curiam* opinion upholding the disclosure requirements contained in § 201, which apply to any person, group, or organization that engages in "electioneering communications." *Id.* at 116sa – 128sa. Because the district court upheld the general broadcast ban, albeit subject to a rewritten definition of "electioneering communications," it did not consider whether the BCRA's disclosure provisions could be justified standing alone.

Lastly, in the same *per curiam* opinion, the district court upheld the extension of coordination rules, which were originally intended to distinguish between express advocacy that is independent of a candidate and express advocacy that is coordinated with a candidate and thus properly treated as a contribution, to all "electioneering communications." Accordingly, the district court found that § 202 of the BCRA is facially constitutional. *Id.* at 128sa – 130sa. Plaintiffs remaining challenges to § 214 and its expanded conception of coordination were largely dismissed as premature and nonjusticiable. *Id.* at 144sa – 157sa.

3. As construed by the district court, Title II of the BCRA will substantially abridge the First Amendment rights of the ACLU and the members it represents. With over 400,000 members nationwide today, the ACLU is perhaps the most well known civil liberties organization in the country. Its work amplifies the voices of all of its members, supporters and contributors.[8]

Since its founding in 1920, the ACLU has never taken a position in a partisan political election, never contributed a dollar to a political campaign or party, never formed a political action committee or "PAC" or affiliated with one, and has gone to great lengths to maintain its rigorously non-partisan stature. Being subject to the Federal Election Campaign Act (FECA) would be fundamentally inconsistent with the ACLU's mission and identity as a nonpartisan organization and would also have serious ramifications for the organization's members and contributors whose identities would have to be disclosed.

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[8] The ACLU is a nonprofit membership organization that has tax exempt status under 501(c)(4) of the Internal Revenue Code. Membership dues to the ACLU are not tax deductible. The basic membership fee is $35, though many members contribute more than that. There is also a reduced-fee membership available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1,000. Although the ACLU does not maintain records on the corporate status of non-individual donors, such donors contributed less than $85,000 of the ACLU's total revenues in 2001, which represents less than 1% of the ACLU's budget. None of the contributions from businesses exceeded $500. Total annual contributions from labor organizations over the last 10 years have never exceeded $5,000. Total contributions from political parties over the same 10 year period were $330. In sum, contributions from non-individual donors represent an insignificant percentage of the ACLU's total annual funding. *See* Declaration of Anthony Romero, J.A. 720. Mr. Romero is the Executive Director of the ACLU.

Because it is a non-partisan organization that does not endorse or support candidates, *all* of the ACLU's advocacy is focused on issues. Yet, ever since the enactment of FECA approximately 30 years ago, the ACLU has been forced to resist efforts to stifle its own speech and the speech of other issue organizations through the overzealous application of overbroad campaign finance laws. For three decades, the ACLU has been at the forefront of the public debate over campaign finance (including our support of a program of full and fair public financing), and has been involved in most of the major litigation testing the constitutional limits of the effort to restrict political speech in the name of campaign finance reform.[9]

On an almost daily basis, the ACLU engages in public commentary on the actions of federal officials, many of whom will be standing for election. *See* Declaration of Laura Murphy, J.A. 609 - 613. Like other advocacy groups, the ACLU conveys its message through multiple media, including the internet, direct mail campaigns, membership drives, press releases, news conferences, public appearances,

[9] Most prominently, the ACLU was co-counsel in *Buckley*, and its New York affiliate appeared as a party. The ACLU, however, has participated in numerous other campaign finance cases, both before and after *Buckley*. *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom, Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *California Medical Association v. FEC*, 453 U.S. 182 (1981); *Brown v. Socialist Workers '74 Campaign Committee* 459 U.S. 87 (1982); *FEC v. National Conservative Political Action Committee* 470 U.S. 480 (1985); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC* 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC* 528 U.S. 377 (2000); *FEC v. Colorado Republican Federal Campaign Committee* 533 U.S. 431 (2001).

pamphlets and other publications that refer to, praise, criticize, describe or rate the conduct or actions of clearly identified public officials. ACLU communications referring to a candidate for elective office are not made for the purpose of influencing the election or defeat of that candidate. The timing of those communications is a function of the timing of debate over the legislation or issue under consideration. *See* Romero Declaration, J.A. 719.

The success of the ACLU is also dependent on broadcast media that report on the organization's activities on an almost streaming basis. The organization is at the front line of many controversial issues, and its views are often sought. But the ACLU cannot always rely on the news media to report its activities or to present its views accurately or completely. Because exclusive reliance on such "earned media" is not sufficient, the ACLU has turned to the use of paid media in an effort to ensure that the organization's views are heard in an accurate and balanced way. For example, the ACLU paid for a series of radio and newspaper ads directed at Speaker of the House Dennis Hastert during his March 2002 primary election. The ads had two purposes. First, they criticized the Speaker for failing to bring the Employment Non-Discrimination Act (ENDA) to the floor of the House of Representatives. At that point, ENDA was actively being considered in the Senate after the legislation had been stalled in the House for some time. The ACLU hoped the ad would be a catalyst to help bring the legislation up for a vote. In addition, the BCRA was then being debated in Congress. The radio and print ad campaign was intended to highlight the impact of Title II on groups like the ACLU, and to dramatize that the ACLU's radio spots would become criminal once Title II was enacted. As the ACLU pointed out at the time, the Hastert broadcast ads would have been illegal had the BCRA been in effect because they referred to Speaker Hastert and were aired in his district within 30 days

of his primary election, even though he was running unopposed. *See* Murphy Declaration, J.A. 612.[10]

Since passage of the BCRA, the ACLU has launched a media campaign to address the many civil liberties issues that have arisen in the past twenty months as the country struggles to maintain our tradition of freedom while responding effectively to the threats posed by international terrorism. *See* Murphy Declaration, J.A. 612. As part of this campaign, the ACLU is prepared to take out additional broadcast ads consistent with a broader media strategy. Romero Declaration, J.A. 721-722. Such media efforts - paid and earned, broadcast and print - are essential to creating a climate of opinion favorable to civil liberties. And because such communications typically concern legislative or executive policies, they frequently refer by name to current officeholders and candidates, including the President. *See* Murphy Declaration, J.A. 611. Title II's ban on "electioneering communications" would effectively mute much of this speech by the ACLU.

It is important to emphasize that whether measured by the 30/60-day rule struck down by the district court or the broader rule it upheld, election years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. The ACLU took out full-page advertisements in *Congress Daily* and *CQ Monitor* on September 30, 2002, urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm-Miller" and

[10] The text of the Hastert radio ad, which would be illegal under the BCRA, is attached as Exhibit A to this brief and was part of the record below, J.A. 615-617. The nearly identical text of the Hastert newspaper ad, which would be allowed under the BCRA, is attached to the Murphy Declaration. J.A. 619.

"Lieberman" versions of the Homeland Security legislation. A copy of the ad is attached to the Declaration of Laura Murphy. *See* J.A. 621. During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* Chart summarizing "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." J.A. 622-626.[11] Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election. Yet this is precisely when Title II most severely restricts the ACLU's use of broadcast ads.

The impact of Title II on the ACLU goes beyond the harm caused by the direct ban on broadcast communications. Even if the ban on "electioneering communications" violates the First Amendment, facially or as applied to the ACLU, § 201 of the BCRA still requires organizations like the ACLU to disclose the identity of their $1,000 donors as the price for taking out broadcast ads. Any such disclosure requirement not linked to candidate contributions or express advocacy would violate longstanding First Amendment rules designed to protect anonymous political speech and the right to associate with controversial political groups. Many ACLU members and donors request explicit assurances that their membership and contributions will remain confidential, and the ACLU has consistently defended their First Amendment right to anonymity. *See* Romero Declaration J.A. 720. While the lower court did not credit this evidence as sufficient to strike down the disclosure provision as applied, we submit that the very fact that the statute can be applied to the ACLU highlights its substantial overbreadth and the danger it poses to the organization's associational interests.

Finally, Title II will negatively affect the ACLU's legislative advocacy in other ways, as well. The

[11] Attached as Exhibit B to this brief.

organization's legislative efforts include many activities directly associated with lobbying. The ACLU regularly meets, speaks or corresponds with members of Congress and Executive Branch officials concerning proposed or pending legislation or executive action that may affect civil liberties. For instance, following September 11, 2001, the ACLU has had numerous direct contacts with members of both the House of Representatives and the Senate urging restraint in the rush to adopt legislation giving the Department of Justice and other federal agencies sweeping law enforcement powers curbing important civil liberties. The ACLU also routinely testifies before Congress, conducts staff briefings for Congress, and provides members with ACLU position papers. *See* Murphy Declaration, J.A. 608-609. By eliminating the link between express advocacy and coordination, §§ 202 and 214 of the BCRA have a chilling effect on these legislative activities even though the ACLU does not, and never has, coordinated its activities with elected officials for the purpose of influencing elections. *See* Murphy Declaration J.A. 610-611.

SUMMARY OF ARGUMENT

1. Under any conception of the First Amendment, the ability of organizations like the ACLU to engage in public debate on critical issues of the day through any medium the organization deems appropriate, including broadcast ads, lies at the very core of constitutionally protected speech. In its zeal to close what they perceived to be loopholes in the current system of campaign financing, advocates of the BCRA attempted to address the problem of so-called "sham" issue ads by adopting a prophylactic rule that bars all broadcast ads by even nonprofit organizations in the period preceding an election if the ads simply mention the name of a federal candidate. The district court, to its credit, recognized that such prophylactic rules have no place

in our First Amendment jurisprudence. Unfortunately, the solution crafted by the district court is equally flawed because it rests on a definition of "electioneering communications" that is hopelessly vague, except insofar as it clearly prohibits advocacy groups like the ACLU from using broadcast ads to question the policy positions of public officials who also happen to be running for office. And, in an era of nearly perpetual campaigns, that means most public officials most of the time.

2. This Court has often stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976). The precision required by *Buckley* is entirely missing from the restrictions on issue advocacy contained in Title II of the BCRA, and upheld by the district court. *Buckley* draws a First Amendment distinction between the permissible regulation of contributions and the impermissible regulation of expenditures. As a further safeguard against the stifling of political dissent, the Court also held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate. . . ." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. . . ." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), has played a critical role for more than two decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation.

Under both the primary and fallback definition of "electioneering communications" contained in the BCRA, an ad by the ACLU criticizing a proposal put forward by President Bush or any of the announced Democratic candidates on civil liberties grounds is treated no differently

than an ad by General Motors expressly advocating the election or defeat of a specific candidate. Both are equally prohibited despite the fact that the ACLU's funds are derived entirely from members and contributors rather than shareholders and customers, and we have never taken a partisan position in our eight-decade history.

Moreover, under the fallback definition of "electioneering communications" crafted by the district court, this prohibition applies throughout the entire election cycle once an individual files his or her candidacy papers. President Bush, for instance, has already filed his papers, as have several candidates for the Democratic nomination. Under the primary definition of "electioneering communications" adopted by Congress, the blackout period would perhaps be shorter but it would cover the period preceding a primary or general election when almost everyone agrees the public is most attentive. Neither prospect is consistent with "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The BCRA also discriminates between broadcast and other media in an awkward attempt to shape the debate over the qualifications of our elected officials. More specifically, § 203 directly restrains the free flow of information through the single most effective medium for reaching the widest possible audience. This type of line drawing cannot be justified by Congress's efforts to "level the playing field" or because of the power of broadcast advertising to influence the public. The fact that the ACLU remains free to speak through other media that Congress has deigned to permit highlights rather than resolves the constitutional problem. The distinction drawn by Congress between the print and

broadcast media has the purpose and effect of stifling core political speech.

The fact that the ACLU can continue to engage in whatever speech it wants by forming a PAC is part of the constitutional problem, not the solution. Unlike many other issue organizations, the ACLU does not have an affiliated PAC. There is a reason for that: the ACLU is not a partisan organization and does not choose to present itself as one. The ACLU cannot and should not be forced to restructure its organization or re-characterize its basic mission in order to engage in constitutionally protected speech. *See, e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Nor is it a sufficient answer to say that the ACLU may qualify as a "MCFL" organization and thus be entitled, at least in the district court's view, to an exemption from the general ban against corporate "electioneering communications." It is not clear that the ACLU will in fact qualify as a "MCFL" corporation so long as we continue to receive even a *de minimis* amount of contributions from sources other than individuals.[12] Moreover, the "MCFL" exception was crafted to permit ideological organizations to engage in express advocacy, not to impose a regime of disclosure and reporting requirements when such organizations engage in issue advocacy.

The decision below cannot fairly be described as an application of *Buckley* or even an extension of its core principles. To the contrary, it represents a return to the initial, imprecise efforts at regulating campaign speech and

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[12] Under recently adopted FEC regulations, a § 501(c)(4) corporation that receives no funds whatsoever from corporate or union sources may be removed from the ban on broadcast communications. 11 CFR § 114.10 (2003). The ACLU does not appear to qualify for the exception, s*ee FEC v. National Rifle Association*, 254 F3d 173 (D.C. Cir. 2001) (denying MCFL status because of $7,000 in corporate contributions), because it accepts contributions from businesses and unions – although in *de minimis* amounts. *See* n.8, *supra*.

advocacy organizations that this Court emphatically rejected in *Buckley* and reaffirmed in *MCFL*. Both the BCRA and the decision below are fundamentally at odds with a central tenet of the Court's campaign finance jurisprudence: the imperative of protecting issue advocacy from campaign finance controls.

3. For similar reasons, the disclosure requirements of § 201 violate *Buckley* and the broader First Amendment principles it embodies. Those principles are designed to preserve associational privacy by limiting mandatory disclosure to circumstances where it truly serves an overriding need, at least in the expenditure context. As first articulated in *Buckley* and later reaffirmed in *MCFL*, the express advocacy test is a constitutionally compelled limit on the otherwise fatal reach of FECA's disclosure provisions. It marks the boundary where permissible campaign finance regulation ends and unregulated speech and association begin. Title II ignores this and other limitations and thereby undermines the First Amendment safeguards that this Court has so carefully erected.

4. Finally, §§ 202 and 214 of Title II significantly and unconstitutionally expand the rules prohibiting the "coordination" of campaign activity with candidates. First, § 202 extends the coordination rules beyond express advocacy to "electioneering communications." Second, § 214 eliminates any requirement of "agreement or formal collaboration." In tandem, these provisions create a significant chilling effect on the ACLU's traditional expressive activities because of FECA's ban on corporate campaign contributions, 2 U.S.C. § 441(b), which applies even to nonprofit advocacy organizations *See FEC v. Beaumont*, 123 S.Ct. 2200 (2003), and which encompasses coordinated expenditures.

ARGUMENT

I. SECTION 203 OF THE BCRA, WHICH PROHIBITS THE ACLU FROM BROADCASTING "ELECTIONEERING COMMUNICATIONS," VIOLATES THE FIRST AMENDMENT.

A. The BCRA's Definition Of "Electioneering Communications" Is Substantially Overbroad And Violates First Amendment Principles That Long Predate *Buckley*

Both the primary and the fallback definitions of "electioneering communication" set forth in the BCRA are irreconcilable with *Buckley*. But before discussing *Buckley*, it is important to note certain fundamental principles of First Amendment law that would require this Court to strike down the BCRA's overbroad ban on "electioneering communications" even if *Buckley* had never been decided.

First, "speech concerning public affairs is more than self-expression, it is the essence of self-government." *Connick v. Meyers*, 461 U.S. 138, 145 (1983)(quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Second, speech cannot be curtailed because of its proximity to an election. *Mills v. Alabama*, 384 U.S. 214 (1966). To the contrary, that is often the moment when political speech is most valuable. Third, freedom of speech necessarily "embrace[s] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). Fourth, neither the fact that the speech or criticism appears in a paid advertisement, *New York Times v. Sullivan*, 376 U.S. 254 (1964), nor the corporate status of the speaker, provides a justification for suppressing speech on matters of public concern. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. v. New York Public Service Commission*, 447 U.S. 530 (1980). Fifth, the Constitution

protects the right of individuals to amplify their voice through group association. *DeJonge v. Oregon,* 299 U.S. 353 (1937). Accordingly, the government must utilize "sensitive tools," *Speiser v. Randall,* 357 U.S. 513, 525 (1958), when it seeks to limit such associational activity, even if the association ultimately chooses to incorporate (like the ACLU) as a nonprofit entity.

The "sensitive tools" required by the First Amendment are missing from the BCRA. Instead, by broadly prohibiting all corporate entities from engaging in any "electioneering communications," without regard to whether the speech of the ACLU and other groups like it poses any genuine threat to the electoral process, Congress has chosen to legislate by labels. This Court can and should reject that approach. Contrary to the premise of the BCRA, the essential purpose of the First Amendment is "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan,* 376 U.S. at 269.

As part of that constitutionally protected "interchange of ideas," comments by the ACLU and other groups "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials." *Id.* at 270. That is not a reason for suppressing the speech. To the contrary, it is evidence of "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the judgment of the people in evaluating conflicting arguments on matters of public concern by suppressing the flow of information essential to informed decisionmaking. *Bellotti,* 435 U.S. at 777. It is "'[t]he very purpose of the First Amendment. . . to foreclose public authority from assuming a guardianship of the public mind. . . .'" *Riley v. National Federation of the Blind,* 487

U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J. concurring)).

The Hastert ad broadcast by the ACLU just prior to the BCRA's enactment into law dramatically illustrates the statute's constitutional shortcomings. As previously described, the ad called on Speaker Hastert to bring stalled legislation up for a floor vote on an issue important to the organization. Under the primary definition of an "electioneering communication," that ad would now be a crime because it was broadcast shortly before a primary election in which Speaker Hastert was running -- even though he faced no opposition, and even though the same ad could be (and was) printed in the newspapers. Under the fallback definition of an "electioneering communication," the blackout period would begin as soon as the Speaker qualified as a candidate under FECA. Once the blackout period began, the ACLU would face possible prosecution if the text of the ad were construed as a criticism of how the Speaker performed his official duties. This Court's cases simply do not allow the government to regulate speech that comments on the conduct of our elected officials.

Even before this Court decided *Buckley*, the ACLU successfully defended itself and others against the unconstitutional application of campaign finance laws to core political speech that was designed to address issues rather than influence elections. *See American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *Buckley v. Valeo*, 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*); *In Re ACLU,* Dkt. MUR 1802 (Federal Election Commission, 1984). Indeed, the ACLU represented the defendants in the very first enforcement suit brought under the new Federal Election Campaign Act. The case involved a handful of dissenters who had published a two-page advertisement in The New York Times in May 1972 urging the impeachment

of President Richard Nixon and praising the few members of Congress who had supported impeachment. *United States v. National Committee for Impeachment*, 469 F. 2d 1135 (2nd Cir. 1972). The United States filed suit claiming the advertisement was "for the purpose of influencing" the elections that year, thereby requiring the approval of all candidates that the ad might be construed as "on behalf of," and rendering the *ad hoc* group of ad sponsors a "political committee" subject to all of the law's new regulations and controls.

The government's position was soundly rejected by the courts. Drawing the now-settled distinction between issue advocacy and candidate advocacy, the Second Circuit ruled that it would be an "abhorrent" and "intolerable" consequence if FECA allowed the government to "regulat[e] the expression of opinion on fundamental issues of the day." *Id.* At 1142. Additionally, the court held that the Act could only be applied to groups under the control of candidates or those making contributions or expenditures "the major purpose of which is the nomination or election of candidates." *Id.* At 1141. Thus were the seeds of both the express advocacy and major purpose tests planted.

The *Committee for Impeachment* suit was followed by *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973). That case arose when the ACLU sponsored an advertisement shortly before the 1972 elections criticizing the Nixon Aministration's anti-busing policies and praising members of Congress who had disagreed with the President's position on busing. The court ruled that the portion of the Act which treated the ACLU advertisements as "on behalf of" the campaigns of members of Congress and "in derogation of" President Nixon's candidacy, "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *Id.* At 1051. Turning to

those portions of FECA that would have treated the ACLU as a "political committee," the *Jennings* court followed the lead of the Second Circuit and ruled that issue-oriented groups whose major purpose is not the election of candidates could not be covered by the Act:

> We are satisfied that by so constricting the reaches of Title III, the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing so their associational rights will not be encroached upon.

Id. at 1057.

These assurances, unfortunately, were short-lived. Only one year later, the 1974 amendments to FECA included a provision, 2 U.S.C. § 437a, requiring disclosure by issue-oriented groups in ways that *Jennings* and *Committee for Impeachment* had ruled impermissible.[13] That provision was challenged as part of the *Buckley* litigation. The District of Columbia Circuit, which upheld every other provision of the

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[13] 2 U.S.C. §437a provided, in pertinent part:

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or had held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidates or to withhold votes from such candidate shall file reports with the Commission as if such person were a political committee.

new law, unanimously struck down § 437a as an unconstitutional regulation of nonpartisan political speech. As the circuit court recognized, the broad statutory language of §437a prohibited even the discussion of campaign issues and candidate voting records, which are "vital and indispensable to a free society and an informed electorate." 519 F.2d. 821, 873 (D.C. Cir. 1975).[14] BCRA's disclosure provisions, discussed in Part II, *infra*, violate the same First Amendment principles identified in these lower court cases and later affirmed in *Buckley*, 424 U.S. 79-80, n. 106.

This history is important both as context for the current dispute and to demonstrate how campaign finance laws have been applied against issue advocacy organizations in the past to stifle political speech that should never have aroused the government's concern. To be sure, there is some comfort in the fact that these prior efforts have been rebuffed by the courts, but "the value of a sword of Damocles is not that it drops, but that it hangs." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

The notion that the special context of an election justifies an abridgement of the right to speak out on disputed issues sets First Amendment jurisprudence on its head. *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002). The free exchange of ideas does not present a threat to our constitutional democracy, it is vital to preserving it. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). "'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." *White*, 536 U.S. at 781 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-23 (1989)).

As the Court observed in *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966):

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[14] Section 437a was repealed a year later. Pub.L.No. 94-283, Title I § 105, 90 Stat. 481 (1976).

> Wherever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political process.

Applying that principle in *Mills*, the Court reversed the conviction of a newspaper editor who wrote an Election Day editorial criticizing the incumbent mayor in violation of state law, which prohibited any electioneering on Election Day. The Court found it "difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press. . . ." than a criminal statute that "silences the press at a time when it can be most effective." *Id.* at 219.

That observation is equally relevant here. Under the First Amendment, it is simply not the function of government to determine which issues should be discussed in a political campaign, when they should be discussed, and who should discuss them. *See Brown* 456 U.S. at 60. Nor is it the role of government to structure that debate by prohibiting broadcast ads because of their ability to reach the widest audience. *See* Point I C, *infra.*

B. The BCRA's Definition Of "Electioneering Communications" Is Directly At Odds With *Buckley* And It's Progeny

Title II of the BCRA is inconsistent with the fundamental First Amendment values discussed above and, for that reason, it is also inconsistent with *Buckley.*

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

424 U.S. at 14-15.

By holding that expenditure limits must be subject to strict scrutiny and that the government's ability to regulate political speech is limited to express advocacy, *Buckley* did not make new law. What *Buckley* held is that campaign finance legislation must be measured against traditional First Amendment standards precisely because it so directly affects vital questions of democratic self-governance. Measured against those standards, the BCRA's definition of "electioneering communications" cannot stand.

1. *Any Effort To Regulate Or Prohibit Independent Speech or Expenditures Must Be Subject To Strict Scrutiny*

Ever since *Buckley,* this Court's campaign finance jurisprudence has rested on a fundamental distinction between expenditure limits and contribution limits. 424 U.S. at 44-58. Expenditure limits are subject to strict scrutiny, contribution limits are not. Because the ban on "electioneering communications" contained in Title II of the BCRA is an expenditure limit, it cannot be upheld unless it is narrowly tailored to further a compelling state interest. In

fact, the BCRA's overbroad definition of prohibited speech and prohibited speakers satisfies neither prong of the strict scrutiny test.

The distinction between contribution limits and expenditure limits articulated in *Buckley* is directly tied to this Court's perception of their impact on speech. On the one hand, "a limitation on the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction on the contributor's ability to engage in free communication." 424 U.S. at 20. On the other hand, "a restriction on the amount of money a person or a group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their explanation, and the size of the audience realized." *Id.* at 19.

By telling the ACLU what it can say in a broadcast ad and when it can say it, the ban on "electioneering communications" in Title II of the BCRA raises all of the concerns that this Court has identified with expenditure limits. The public is precluded from hearing the ACLU's message in the format that the ACLU seeks to deliver it, and the ACLU is precluded from pursuing a communications strategy that, in its view, will "effectively amplify[] the voice of [its] adherents." *Id.* at 22. As the facts of this case demonstrate, expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. It is not surprising, therefore, that expenditure limits have been regarded by the Court as presumptively unconstitutional.

In *Buckley* itself, the Court ruled that a $1,000 cap on expenditures "relative to a clearly identified candidate" could not be sustained because it "heavily burdens core First Amendment expression." In *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978), the Court invalidated a state law that barred corporations from making expenditures

for the purpose of "influencing or affecting" a referendum after describing the prohibited speech as "indispensable to decisionmaking in a democracy." In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985)(*NCPAC*), the Court ruled that a political action committee could not be barred from spending more than $1,000 to "further the election" of a publicly financed presidential candidate. Characterizing PACs as "mechanisms by which large numbers of individuals of modest means can join together in an organization," *id.* at 494, the Court noted that "the expenditures at issue in this case produce speech at the core of the First Amendment." *Id.* at 493. And, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996)(*Colorado I*), the Court struck down an expenditure limit on the independent spending of political parties. Justice Breyer's plurality opinion in *Colorado I* reiterated the Court's well-established distinction between expenditure limits and contribution limits. He then observed: "The independent expression of a political party's views is 'core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.* at 616.

The Court's recent opinion in *FEC v. Beaumont*, ___ U.S. ___, 123 S.Ct. 2200 (2003), is entirely consistent with this approach. In ruling that a federal ban on corporate campaign contributions could be applied even to nonprofit entities (including *MCFL* groups), the Court stressed the distinction between contribution limits and expenditure limits. Indeed, the Court described it as "the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions . . . ." *Id.* at 2210. In upholding the ban, the Court reiterated its concern that certain non-profit groups, like political parties and other organizations, could act as a conduit for large corporate contributions *Id.* at 2207. *See also Federal Election Commission v. Colorado Republican Campaign Committee*,

533 U.S. 431, 456 & n.5 (2001). In the context of a contribution limit, the perceived danger of corporate contributions to the political process was sufficient to justify the statute's prophylactic approach. Under the heightened scrutiny applicable to expenditure limits, however, Congress is not free to regulate so broadly. *See MCFL*, 479 U.S. at 260. *Beaumont* thus reaffirmed the holding in *MCFL* by adhearing to the constitutional distinction between permissible regulation of contributions and impermissible regulation of expenditures by non-profit corporations.

The BCRA not only ignores this distinction, which is sufficient to invalidate Title II restriction on "electioneering communications," but it also assumes without any basis that even nonprofit advocacy groups should be treated as a source of corruption in the electoral process unless every penny of their budget comes from individual contributions. For the ACLU and many other organizations like it, that assumption is entirely unfounded and highlights yet another facet of the statute's unconstitutional overbreadth.[15]

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[15] The lower court did not find, nor is there any basis to believe, that the ACLU is a shill or conduit for large corporate contributions. No single business entity gave the ACLU more than $500 in 2001. *See n. 8, supra.* Our records do not allow us to determine if a $250 contribution from "Bennington Pottery" or "Kathleen's Bake Shop" is a corporate contribution or not. In any event, that question has little relationship to any compelling state interest. The government claimed below that the ban on "electioneering communications" "carefully limits BCRA's reach to those ads sponsored by unions and corporations that present the greatest potential for distortion or corruption of the political process." Gov't Resp. Br. at 67. Where the ACLU is concerned there could not be a less apt description or a regulation wider of the mark. The ACLU simply does not present the type of problems that Congress purportedly sought to remedy by adoption of the BCRA. Conversely, the effort to apply the BCRA to the ACLU and similar groups is ample proof of the statute's constitutional overbreadth.

2. *The Express Advocacy Rule Announced In Buckley Is A Necessary Safeguard To Prevent The Suppression Of Constitutionally Protected Speech*

In addition to holding that expenditure limits are subject to strict scrutiny, the *Buckley* Court also ruled that any restrictions on political speech must be limited to express advocacy. The two doctrines are closely related. Put another way, an expenditure limit is not narrowly tailored if it does not include the express advocacy rule.

Title II of the BCRA clearly fails that test. Indeed, Congress made no effort to hide the fact that its definition of "electioneering communications" was designed to correct what it considered the flaws in the express advocacy rule announced by this Court in *Buckley*. Under the express advocacy rule, of course, only speech that expressly advocates the election or defeat of a particular candidate is subject to regulation through the campaign finance laws. Congress apparently viewed this as a loophole that needed to be closed. *Cf. City of Boerne v. Flores*, 521 U.S. 507 (1997)(Congress cannot rewrite constitutional rules through legislation).

During the course of this litigation, defendants and intervenors have additionally argued that the express advocacy rule was never intended to state a substantive rule of First Amendment law. They portray it instead as merely a response by the *Buckley* Court to the vagueness of FECA's original expenditure limits, which applied to any speech "relative to a clearly identified candidate." In their view, the BCRA has solved that problem in a different way by unambiguously banning any broadcast ad by a corporate sponsor (including the ACLU) that "refers to a clearly identified candidate" in the period preceding either a primary or general election.

Neither claim is persuasive. The express advocacy rule plays a far more central role in this Court's campaign

finance jurisprudence than proponents of the BCRA have acknowledged. It defines the line between speech that can be regulated and speech that cannot. In drawing that line in *Buckley*, the Court understood that groups would always be able to devise "expenditures that skirted the restriction on express advocacy. . . . but nevertheless benefited the candidate's campaign." 424 U.S. at 46. Significantly, however, the *Buckley* Court also understood the converse proposition: that without a bright line between issue advocacy and express advocacy, speakers would inevitably "hedge and trim" their political message in an effort to avoid unreasonable government scrutiny. *Id.* at 23 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Accordingly, all speech which does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views," *Buckley*, 424 U.S. at 45, and they are also free from reporting and disclosure requirements. *Id.* at 79-80. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. at 238. As the Court recognized in *Buckley*, the First Amendment demands a bright line because political campaigns in the real world so rarely provide one. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* at 42.

The primary definition of "electioneering communication" set forth in the BCRA is plainly inconsistent with the express advocacy rule. The fallback definition is equally flawed, even as written by Congress. Without the limiting language that Congress inserted and that the district court severed, the fallback definition has not only become less precise, it is functionally indistinguishable

from FECA's original reference to speech "relative to a clearly identified candidate," which is what led the *Buckley* Court to develop the express advocacy rule in the first place. *Id.* at 39-59.

To be sure, the express advocacy rule was announced in *Buckley* in the context of a vagueness discussion. Vagueness, however, was never its only concern. When the Court reaffirmed the express advocacy rule in *MCFL,* it specifically noted that the rule had been crafted "in order to avoid problems of overbreadth." 479 U.S. at 248. The BCRA does not "avoid problems of overbreadth," it embraces them as essential to addressing the proliferation of so-called "sham" issue ads.[16] Unfortunately, in its eagerness to ban such ads, the BCRA also prohibits the ACLU from broadcasting a message urging the President to respect civil liberties in the war against terrorism. That is not a trade-off that the government gets to make, nor has this Court ever upheld such a far-reaching proscription of core political speech.

In the years since *Buckley*, the express advocacy doctrine has been an indispensable bulwark against overzealous efforts to regulate core political speech. From *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc)*(finding that Commission's enforcement suit against a tax protest group to be "totally meritless"), to *Clifton v. FEC*, 114 F.3d. 1309 (1st Cir. 1997) (invalidating FEC regulations on limiting voter guides), the government has suffered "a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'issue advocacy' and the permissible scope of the FEC's regulatory authority over

[16] Defendants and intervenors heavily rely on a Brennan Center study to document the proliferation of so-called "sham" issue ads. The flaws in the Brennan Center study are discussed at length in other briefs and will not be repeated here.

. . . political speech." *Federal Election Commission v. Christian Action Network, Inc.,* 110 F.3d 1049, 1064 (4th Cir. 1997)(authorizing an award of fees and costs against the Commission for bringing enforcement proceedings against an issue group in clear violation of this Court's "express advocacy" doctrine). *See also Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002); *Citizens for Responsible Government State PAC v. Davidson*, 236 F. 3d 1174, 1187 (10th Cir. 2000); *Iowa Right to Life Comm. Inc. v. Williams,* 187 F.3d. 963, 969 (8th Cir. 1999).

Those cases can and should stand as a cautionary tale. The purpose and effect of the express advocacy rule is to provide political speech with the "breathing space" required by the First Amendment. *NAACP v. Button,* 371 U.S. 415, 433 (1963). In that way, it functions much like the "actual malice" rule of *New York Times v. Sullivan,* 376 U.S. 254 (1964), or the "incitement" rule of *Brandenberg v. Ohio,* 395 U.S. 444 (1969). The Court recognized in *Sullivan* that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct. . . ." *Id.* at 273. The express advocacy rules creates an equivalent constitutional shield that is similarly designed to safeguard uninhibited public debate on issues of obvious public concern. By attempting to override the express advocacy rule, Title II eliminates that necessary constitutional safeguard.

3. *The BCRA's Overbroad Definition Of "Electioneering Communications" Undermines Any Asserted Compelling State Interest*

Beyond their disagreement with the express advocacy rule, proponents of the BCRA defend its restriction on "electioneering communications" on two principal grounds. First, they argue that the broadcast ban should be upheld because it only applies to unions and corporations that have traditionally been subject to greater regulation under the

campaign finance laws. Second, they contend that objections to the broadcast ban are overblown because any group covered by the ban can avoid its proscription by creating a political action committee. Both arguments suffer from fatal oversimplification.

This Court has applied the same framework for analyzing campaign finance restrictions on corporations and unions that it has applied to individuals and unincorporated entities. That is to say, the Court has differentiated between expenditure and contribution limits and then considered whether the challenged regulation can survive the appropriate standard of review. *MCFL* is the critical case on this issue. In *MCFL,* the Court held that nonprofit, ideological corporations could not be barred from engaging in express advocacy or required to establish a "separate segregated fund" and comply with burdensome reporting requirements. The government had argued there, as it has argued here, that all corporations could be held to a single standard. The Court disagreed. "The desirability of a broad prophylactic rule cannot justify treating alike business corporations and [nonprofit corporations] in the regulation of independent spending." *Id.* at 260. Instead, the Court carefully examined whether the general ban on corporate political spending made sense in the context of a nonprofit advocacy group like Massachusetts Citizens for Life.

The Court began that examination by noting that the traditional rationale for regulating corporate political activity is that a corporation's ability to amass wealth, and thus influence the political process, has little to do with popular support for its political positions. It then noted that the opposite is true for organizations like MCFL, which rely on the contributions of ideological supporters to fund their activities. Indeed, the Court explained, "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal

direction." *Id.* at 261. Thus, the Court concluded, "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *Id.* at 263.

The Court reached a different conclusion in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), but only because the Court confronted a very different set of facts. The state law in *Austin,* like the federal law in *MCFL,* prohibited corporations from engaging in independent campaign expenditures. However, unlike Massachusetts Citizens for Life, the Michigan Chamber of Commerce lacked many of the characteristics that the Court found dispositive in *MCFL.* Although organized as a non-profit corporation, more than three-quarters of its contributors were business corporations. *Id.* at 664. And because the Chamber engaged in many non-ideological activities of tangible benefit to its members, the Court found that even members who disagreed with its ideological positions would be reluctant to terminate their membership. For purposes of campaign finance regulation, it therefore resembled a business corporation, at least insofar as its financial resources did not necessarily reflect its political support.[17]

On the spectrum of incorporated entities, there is no doubt that the ACLU lies much closer to Massachusetts Citizens for Life than to the Michigan Chamber of Commerce, let alone General Motors. In contrast to the latter two corporations, the ACLU's financial resources directly reflect the ideological support of its members and contributors. In contrast to Massachusetts Citizens for Life, the ACLU has never advocated the election or defeat of a candidate for office. To quote the intervenors, "the ACLU

[17] The Court took an equally pragmatic approach in *FEC v. Beaumont,* 123 S.Ct. 2200. Rather than focus on the difference between nonprofit corporations and business corporations, which had been so pivotal in *MCFL,* the Court focused instead on the difference between contribution limits and expenditure limits. *See* p. 28, *supra.* In this case, of course, the ACLU is challenging an expenditure limit.

can credibly claim that 'all of [its] advocacy is focused on issues.'" Intervenors' Response at I-75. Even more so than in *MCFL*, therefore, "the concerns underlying the regulation of corporate political activity are simply absent with regard to" the ACLU. 494 U.S. at 263. Yet, Title II of the BCRA treats all corporations alike, including the ACLU, based on precisely the sort of "broad prophylactic rule" that this Court rejected in *MCFL*.

The district court was obviously constrained by *MCFL* and construed Title II to exclude qualified *MCFL* corporations. At the very least, this Court should affirm that holding. Outside the realm of express advocacy, however, even *MCFL* does not provide adequate protection for the constitutionally protected speech of groups like the ACLU. First, *MCFL* was intended to place a limit on the government's ability to regulate express advocacy and not to open the door for government regulation of issue advocacy. Second, the district court decision leaves it unclear, at best, whether the ACLU qualifies for an *MCFL* exemption.[18]

The lower Court's answer to this objection is that the ACLU can establish a PAC if it wants to speak. But, Congress cannot circumvent *Buckley* by requiring the ACLU to finance constitutionally protected speech through a segregated fund or PAC. While this requirement may be understandable in the context of contributions made by non-profit corporations to candidates, *see Beaumont,* it cannot be justified in the context of independent expenditures, *see*

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[18] Under prevailing law in the District of Columbia Circuit, *see FEC v. National Rifle Association,* 254 F.3d. 173 (D.C. Circuit 2001), and recently promulgated FEC regulations, *see* 11 CFR § 114.10, the ACLU does not qualify for an *MCFL* exemption because it has not returned the exceedingly modest amount of money that has been contributed to the organization in recent years from sources other than individuals. *See* n.12, *supra*.

MCFL, much less those expenditures that do not purport to seek to influence elections. Political committees are regulated as such because their primary purpose is to influence federal elections. The ACLU and thousands of other organizations like it are not created for this purpose and should not be required to operate as if they were. If at some time it is determined that the ACLU has crossed the line and become an organization whose primary purpose is to influence federal elections, it would automatically be subject to the obligations and restrictions applicable to political committees. See *MCFL,* 479 U.S. at 262. That time has not come and there is no justification for extending FECA's coverage to the organization's speech.

The concept of a PAC is at odds with the ACLU's 83-year tradition of non-partisan advocacy of civil liberties; if imposed on the ACLU, it would convey a misleading image of political partisanship that does not accurately reflect the organization or how it operates. The government may not require that the ACLU recharacterize its mission or falsely represent it as a condition of exercising its First Amendment rights. *See, e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

C. The Government Is Foreclosed From Limiting Radio And Television Access In An Effort To Level The Playing Field Or To Otherwise Influence The Debate Over The Qualifications Of Elected Officials

Under the BCRA, the same ad that can be printed in the newspaper cannot be read on the radio or broadcast on television without subjecting its sponsor to possible criminal prosecution. The only justification offered for this distinction is that Congress believed that radio and television are more powerful than print ads and can reach a wider audience. It is far from clear that this is always the case. For example, some newspapers reach a larger audience than some radio

stations. In any event, the approach that Congress has taken is wrong on several grounds even if its factual assumptions are right.

First, when dealing with political speech, Congress cannot attempt to level the playing field by deciding that some speakers can no longer speak through the medium of their choice. *Buckley*, 424 U.S. at 48-49. Second, the exercise of constitutional rights cannot be "abridged on the plea that they may be exercised some other place." *Schad v. Mt. Ephraim*, 452 U.S. 61, 76-77 (1981). Third, Congress cannot discriminate among or between media in a way that "threatens to suppress the expression of particular ideas or viewpoints," *Leathers v. Medlock*, 499 U.S. 439, 447 (1990), or that operates "as effectively as a censor to check critical comment." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983). All three principles reflect the First Amendment interest in neutrality, and all three principles are violated by the broadcast ban in Title II of the BCRA.

In *Buckley*, this Court squarely rejected the argument that expenditure limits could be justified by the government's interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. The Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 48-49 (internal citations omitted). *Mills v. Alabama*, 384 U.S. 214, and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), are to the same effect in rejecting the idea that it is the government's role to introduce balance into the debate over the qualifications of our elected officials. Although the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), upheld the Fairness Doctrine because of issues of scarcity unique to the broadcast industry, that justification has not been advanced in this case in support of the broadcast ban. In fact, just the opposite consideration is in play: Congress is seeking to constrict the flow of ideas, rather than enlarge it.

In addition, this Court's cases reject the idea that the BCRA's ban on broadcast ads passes constitutional muster because it allows for the ACLU to place the same ads in the print media. Rather, this Court has established that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (citing *Schneider v. State*, 308 U.S. 147, 163 (1938)). Contrary to the arguments made in this case, the government cannot foreclose a "distinct and traditionally important medium of expression," just because another one exists. *See City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994)(the availability of other forms of advertising did not justify restrictions on lawn signs); *see also Schneider*, 308 U.S. at 163; *Schad*, 452 U.S. at 76-77. Like streets, the broadcast media are "natural and proper places for the dissemination of information and opinion," *Schneider*, 308 U.S. at 163, and it is no answer under this Court's jurisprudence for Congress to claim that the BCRA is constitutional merely because the ACLU can express its ideas and opinions elsewhere.

Finally, in a separate line of cases that we believe is applicable here the Court has said that, when regulating the media, the government cannot discriminate against those

speakers capable of reaching the largest audience for the purpose of suppressing speech. *See Grosjean v. American Press Co.*, 297 U.S. 233, 244-49 (1936) (invalidating a tax law that singled out large publications); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (striking down a tax scheme that penalized large publications); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (holding unconstitutional a tax exemption for certain magazines which resulted in a small number of large magazines paying the tax). We understand that these cases were brought by members of the media industry, but we believe that the overriding principle is the same when the effect of the line Congress has drawn is to "stifle the free exchange of ideas," *Leathers*, 499 U.S. at 453, by preventing speakers from having access to those media outlets. This principle resonates with the Court's long held belief that the First Amendment prevents "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens," *Grosjean*, 297 U.S. at 249-50.

The distinction between broadcast and print media that Congress approved in the BCRA suffers the same constitutional defect as the distinctions struck down in *Minneapolis Star* and *Arkansas Writer's Project*. Congress has intentionally drawn its line in order to censor the expressive activities of particular speakers, like the ACLU, by prohibiting them from reaching the largest audience possible. By reducing the size of the audience, the BCRA necessarily diminishes the force and impact of the speaker's message. Such an effort on the part of the government to regulate political discussion can only be seen as "operating as a censor to check critical comment," *Minneapolis Star*, 460 U.S. at 585, which impermissibly "stifl[es] the free exchange of ideas." *Leathers*, 499 U.S. at 453. The consequences of Congress's decision to target the broadcast

medium as a whole are thus indistinguishable from those arising from the government's decision to target particular newspapers in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers*, since each act embodies the dangers of censorship and threatens to distort the marketplace of ideas.

These First Amendment doctrines, whether viewed alone or together, highlight the unconstitutionality of the choice that Congress has made. The BCRA directly restrains the free flow of information by shutting down an entire medium. The uncontested evidence showing that the airwaves are the most effective and far-reaching medium of communication provides less, not more, justification for the restrictions. The fact that the ACLU can communicate its message in print ads cannot save the broadcast ban from its constitutional infirmity of stifling the free exchange of ideas.

II. THE DISCLOSURE AND REPORTING REQUIREMENTS OF SECTION 201 ARE UNCONSTITUTIONAL.

Under § 201, the ACLU has to report to the government in order to criticize the elected officials who run the government, assuming the ACLU is even entitled to run such broadcast ads under § 203. The reporting and disclosure requirements contained in Title II cross the line between constitutionally permissible disclosure rules and disclosure rules that place an unconstitutional burden on First Amendment speech. They thus go far beyond anything this Court upheld in *Buckley*.

In assessing the BCRA's disclosure rules, it is important to understand their practical import. As soon as the ACLU has disbursed more than $10,000 in a calendar year for any "electioneering communications," as defined by the BCRA, it must file a statement with the FEC. The statement must be filed within 24 hours and making further expenditures totaling more than $10,000 triggers additional reporting obligations. The mandatory disclosure

requirements are simultaneously detailed and vague.[19] Of greatest concern, they require the ACLU to disclose the name and address of anyone who contributed more than $1,000 to the organization over a period that could be as long as 22 months.[20]

Both before and after *Buckley,* this Court has powerfully reaffirmed the importance of preserving the right to anonymous political speech and association, especially for those advocating unpopular causes. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California,* 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission, supra.* In *Buckley* itself, the Court observed that compelled disclosure "can seriously infringe on privacy of association and belief

[19] The statement, filed under penalty of perjury, must contain the following information. First, it must state "(A) the identification of the person making the disbursement, of any person sharing or exercising control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement." The ACLU is governed by an 83 member Board of Directors. Do they all have to be identified every time the ACLU runs an ad criticizing the President or a member of Congress? The disclosure statement must also contain "(C) the amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made." Thus, the ACLU would be required to identify all vendors and others involved in the preparation and presentation of each advertisement. In addition, the statement must identify "(D) the elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified." If the ACLU criticizes President Bush, a declared federal election candidate, does that "pertain" to any of the presidential primaries, the general election, either, or both?

[20] The ACLU must identify all of its $1,000 contributors unless it creates a segregated account to pay for "electioneering communications," in which case only $1,000 contributors to that fund need to be disclosed. In either event, the $1,000 threshold is an aggregate amount that is measured from the first day of the preceding calendar year to the disclosure date. Thus, an ad criticizing one of the presidential candidates in the week before the November 2004 election would have to consider all individual contributions made after January 1, 2003.

guaranteed by the First Amendment," 424 U.S. at 64. This Court was therefore careful in *Buckley* to weigh the necessity of any disclosure rules against the state's overriding interest in preventing corruption or the appearance of corruption in the electoral process. Using that scale, the *Buckley* Court upheld disclosure for political contributions, and for the expenditures of political candidates and committees. At the same time, the Court ruled that other political speech could only be subject to the government's disclosure rules if it amounted to express advocacy.

The government argued in *Buckley,* as it argues here, that "total disclosure" of all political expenditures is necessary "to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 76. The Court was not unsympathetic to that concern. Nonetheless, applying strict scrutiny, the Court was unwilling to accept the free speech costs of imposing a disclosure requirement on speech that did not meet the express advocacy test. Under those circumstances, the Court wrote, "the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79-80.

The BCRA abandons this careful approach by disregarding the express advocacy rule and ignoring the narrow tailoring that *Buckley* requires. Insofar as the broadcast ban violates the First Amendment because it directly restricts speech that does not constitute express advocacy, the burdensome reporting and disclosure provisions that are triggered by the same unconstitutional definition of "electioneering communications" cannot stand. *Buckley*, 424 U.S. at 79-80. Having upheld a revised definition of "electioneering communications," the district court did not consider whether the disclosure provisions would survive if the direct ban were struck down.. Nevertheless, *Buckley* forecloses that possibility for the same

reason that BCRA's direct restraint on speech is unconstitutional.

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest," even in the campaign finance context. *MCFL*, 479 U.S. at 256. The court below pointed to multi-million dollar election season advertising campaigns by certain organizations and individuals as justifying the BCRA's broad disclosure rules. But that concern fails as justification for a statute that can be triggered by running a few radio ads that mention federal elected officials during the course of an entire election calendar year, and that applies without regard for either the kinds of organizations involved or the need for public information about them.

Based on *Buckley* and *MCFL*, Congress could have drawn a more careful and narrow line. If the concern was the existence of groups or individuals whose "major purpose" is the funding and sponsoring of broadcast advertisements that might influence public opinion about specific federal candidates during the election season, the remedy could have been to require reporting and disclosure only of such groups. *See MCFL*, 479 U.S. at 262. Under such a targeted rule, the ACLU and countless other issue organizations across the political spectrum, for whom broadcasting advertising is collateral or incidental to their main advocacy activities, would have been spared the BCRA's intrusive regulatory regime. Congress chose not to do so.

Similarly, Congress could have focused its disclosure rules on business or capital corporations, which animated the first federal regulation in this area almost 100 years ago. Yet, even the effort to exempt nonprofit organizations from the broadcast ban was effectively repealed when the Snowe-Jeffords Amendment was supplanted by the Wellstone Amendment's insistence on universal coverage. By failing

to act with the precision that the rights at stake require, Congress impermissibly imposed a "crudely crafted burden" on First Amendment rights. *United States v. National Treasury Employees Union*, 513 U.S. 454, 477 (1995).

Finally, even in the context of express advocacy, the *Buckley* Court recognized that there is a particularly grave risk of chilling political speech when the government insists on publicly disclosing an individual's association with controversial political organizations. 424 U.S. at 74. On that basis, the Court ruled in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), that campaign finance disclosure laws cannot be applied to controversial political parties, even those that engage in core campaign and electoral activities. This necessary safeguard is missing from Title II, as well.

Though the Court below discounted the record of harm from disclosure presented by the ACLU and other groups as not showing a sufficiently intense pattern of harassment and threats to warrant relief from the disclosure rules, this primarily facial challenge to the BCRA was not the proper occasion for a full-blown trial on harassment, as the court below recognized. But the record clearly shows that the ACLU and other groups have a firm reason to resist disclosure and protect the identity of their members and supporters.[21] Congress was oblivious to that interest in

[21] The ACLU submitted an uncontroverted affidavit by its Executive Director, Anthony Romero, stating that many of its members and contributors seek an explicit assurance that their anonymity will be preserved, and the ACLU has fought strenuously to do so throughout its history. Romero Declaration, J.A. 720. The district court criticized this showing as inadequate because it did not specify why the ACLU's members and contributors would want to preserve their anonymity. With due respect, we respectfully submit that the ACLU's defense of unpopular causes is well known and does not require extensive elaboration. Moreover, the connection between the ACLU's advocacy on controversial issues and the desire to preserve the privacy of its members and contributors has been recognized by other courts in

enacting § 201. Not only did it require disclosure of relatively modest expenditures, especially considering the broad reach of the statute, but it failed to provide for any "SWP exemption," or even any administrative procedure for raising such claims.

III. SECTIONS 202 AND 214, WHICH SIGNIFICANTLY EXPAND THE FECA'S RESTRICTIONS ON "COORDINATION," VIOLATE THE FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH, ASSOCIATION, AND PETITION.

Sections 202 and 214 of Title II significantly expand the rules prohibiting "coordination" of campaign activity with candidates. First, § 202 extends the coordination rules beyond express advocacy to "electioneering communications." Second, § 214 eliminates any requirement of "agreement or formal collaboration." In tandem, these provisions create a significant chilling effect on the ACLU's traditional expressive activities. The consequences are not insignificant because as a corporation the organization is governed by a separate provision of FECA that prohibits corporate contributions. 2 U.S.C. 441 (b). [22]

analogous circumstances. *See, e.g., New York Civil Liberties Union v. Acito*, 459 F.Supp. 75 (S.D.N.Y. 1978); *ACLU v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1975).

[22] The district court upheld the coordination provisions of § 202 but ruled that plaintiffs' challenge to the coordination provisions of § 214 was largely nonjusticiable because the final implementation of § 214 was dependent on the promulgation of new coordination rules by the FEC. While that is true, it is also true that § 214 establishes a specific set of guidelines for the FEC to follow in implementing its new rules. Other parties, notably the Chamber of Commerce and the AFL-CIO, are addressing the coordination and related justiciability at greater length. This discussion has been kept brief to avoid repetition.

Rather than treat coordination as the absence of independence and the functional equivalent of candidate control or instigation, see *Buckley v. Valeo*, 424 U.S. at 47 & n.53, the BCRA broadly deems any "substantial discussion" about public communication between a candidate and an issue group as a basis for a finding of "coordination." Such "coordination" then taints later commentary by the issue group on the subjects discussed by treating it as a prohibited corporate contribution. The repeal of current FEC rules requiring agreement or formal collaboration directed by Title II casts the net further by eliminating a common sense understanding of what is required to satisfy the definition of coordination in this context.

The record shows how these new rules can chill and disrupt legislative and policy discussions by ACLU officials with Members of the Executive or Legislative branches. *See* Declaration of Laura Murphy, J.A. 609-611. Read literally, § 214 can effectively impose a year round prohibition on all communications made by a corporation like the ACLU where there has been "substantial discussion" about the communication with a candidate. This feature of the BCRA acts as a continuing prior restraint which bars the ACLU from engaging in core First Amendment speech for the lawmaker's entire term of office.

More generally, these coordination rules will impair the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, *see Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

CONCLUSION

For the reasons above, the challenged provision of Title II of the BCRA should be declared unconstitutional.

Respectfully submitted,

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JULY 8, 2003

Appendix A

Copy of Hastert radio ad paid for by the ACLU. The ad was broadcast on multiple Chicago and Aurora, Illinois radio stations the week of 5/15 – 3/17/02.

ACLU- Radio

60 Seconds
R201-x13 – ENDA Delays

Sound Effect: Long Tympani/ Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *And now…*

Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: ……We're Waiting

Sound Effect: Long Tympani/ Drum Roll Starts Again
Sound Effect: Drum Roll Ends with Cymbal Crash
Sound Effect: 2 Seconds of Silence

Male Announcer: *Waiting for our Congressman,*(Sound Effect Music Up – Pop Goes the Weasal or Circus Music) *Dennis Hastert, to protect everyone from discrimination on the job.*

As speaker of the House, Representative Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act – ENDA – up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, ***including lesbians and gay men,*** *and make sure that it's the quality of our work that counts, and nothing else.* (Music Out.)

Male Announcer: *So Congressman Hastert*

Sound Effect: Tympani/Drum Roll

Male Announcer – Master of Ceremonies (during sound effect): *What will it be?*

Sound Effect: Drum roll ends with Cymbal Crash

Male Announcer: *Protecting workers from discrimination, or more delays?*

Female Announcer: Take action now. Send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor by going to www.aclu.org/enda.

Male Announcer: Paid for by the American Civil Liberties Union.

Appendix B

106th Congress Congressional action during the 60 days prior to November general election on bills of interest to the ACLU.

106th Congress
Congressional Action
During the 60 Days Prior to November General Election
On Bills of Interest to the ACLU

Capital Punishment:

- "Sense of Congress" regarding the obligation of grantee states to ensure access to post-conviction DNA testing and competent counsel in capital cases (Amdt. 4345 to S. 3045): Introduced in the Senate on 10/26/2000.

Church State:

- Bill to protect religious groups in land-use disputes (S 2869) signed by the President on 9/22/2000; P.L. 106-274.
- Allows faith-based organizations to receive federal support for programs to help low income fathers get more involved in their families' lives (HR 4678): Passed House 9/7/2000.

Criminal Justice:

- Provide grants to states to process backing of DNA evidence (HR 4640): Passed House 10/2/2000.
- Pressure states into requiring HIV testing of rape suspects who have been formally charged, by threatening to withhold federal crime-fighting block grant money (HR 3088): Passed House 10/2/2000.
- Aimee's Law: cuts federal crime fighting money to states if convicted murderers & rapists did not serve stiff sentences and went on to commit offense in another state (part of HR 3244): Passed Senate 10/11/2000.

Gay and Lesbian Issues:

- Repeal federal charter of Boy Scouts, in reaction to Supreme Court decision that allows Boy Scouts to discriminate against homosexuals (HR 4892): Defeated in House 9/13/2000.
- Prohibit using local federal funds for needle exchange (amendment to HR 4942): Passed House 9/27/2000.
- Prohibit the use of Federal funds for the conduct or support of programs of HIV testing that fail to make every reasonable effort to inform the individuals of the results of the testing (HR 5615): Introduced in the House on 10/11/2000.

Hate Crimes:

- Expansion of federal hate crimes law (amendment to S 2549): House voted to instruct conferees to accept amendment 9/13/2000; conferees dropped language from bill 10/5/2000.

Immigration:

- Allow some immigrants who committed minor crimes long ago to apply to stay in US and not be deported; part of "Fix '96" (HR 5062): Passed House 9/19/2000.

Internet Filtering:

- Force schools and libraries to use technology protection measures to block access by children to web pornography (amendment to HR 4577): Conferees added this provision to the bill 10/23/2000.

Media & Violence:

- Require violent TV programming be limited to hours when children are not likely to be a substantial part of

audience (S 876): Approved by Senate Commerce committee 9/20/2000.

Physician-Assisted Suicide:

- Overturns Oregon's law that permits physician-assisted suicide (amendment to HR 2614): Passed House 10/26/2000; Filibustered in Senate 10/27/2000.

Privacy:

- Restrictions on law enforcement use of electronic surveillance (HR 5018): Approved by House Judiciary subcommittee 9/14/2000; Mark-up by House Judiciary committee 9/20/2000.
- Creation of commission to study issue of privacy on the internet (HR 4049): Defeated in House 10/2/2000: failed to get 2/3's majority needed for passage under suspension of rules.
- Prohibit the appearance of Social Security account numbers on or through unopened mailings of checks (HR 3218): Passed House 10/18/2000; Passed Senate 10/25/2000.
- Enhance privacy protections for individuals, and to prevent fraudulent misuse of Social Security account numbers (HR 4857): House full committee mark up on 9/28/2000.

Reproductive Rights:

- Funding prohibition in DC Approp. (HR 4942; HR 5633): Passed both House and Senate on 11/14/2000.
- "Conscience clause" to employee-sponsored health plans coverage of contraceptives (amendment to HR 4942): Passed House 9/14/2000.
- Abortion restrictions on international family planning aid (HR 4811): Conference Committee appointed

10/19/2000; House debates conference report 10/25/2000.

- Define "human being;" seeks to protect humans born alive at any stage of pregnancy (HR 4292): Passed House 9/26/2000.
- Prevent abortion protestors convicted of violent crimes from seeking bankruptcy protection to avoid paying hefty legal penalties (amendment to S 3046): Senate voted to proceed with debate on 10/19/2000.
- Prohibit use of funds to distribute postcoital emergency contraception ("morning after pill" on elementary or secondary school premises (HR 4577, Labor/HHS Approp.): Rep. Coburn announces intention to offer motion to instruct House conferees on this amendment on 9/18/2000.

Secret Evidence:

- Makes it harder for INS to use secret evidence to deport immigrants or to deny them asylum (HR 2121): Approved by House Judiciary Committee 9/26/2000.

Terrorism:

- Provide clearer coverage over threats against former Presidents and members of their families (HR 3048): House disagreed with certain Senate amendments on 10/25/2000.

Trafficking and Victims:

- Combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions (HR 3244): Passed Senate 10/11/2000.

Violence Against Women:

- Reauthorization of VAWA ((HR 1248): Passed House 9/26/2000; Passed Senate as part of HR 3244 10/11/2000.

Voting Reform:

- Proposing a constitutional amendment to abolish the electoral college and to provide for the direct popular election (SJRes 56): Introduced in the Senate on 11/01/2000. Proposing a constitutional amendment to abolish the electoral college (HJRes 113): Introduced in the House on 10/12/2000.